


Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington D.C. 20554

  
**RECEIVED**

In re: )  
)  
1998 Biennial Regulatory Review -- )  
Streamlining of Mass Media )  
Applications, Rules and )  
Processes; Policies and Rules )  
Regarding Minority and Female )  
Ownership of Mass Media )  
Facilities )

JAN 19 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

MM Docket Nos. 98-43 and 94-149

To: The Commission

**PETITION FOR RECONSIDERATION**

Respectfully submitted,

**KM COMMUNICATIONS, INC.**

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## Executive Summary

The Commission's recent amendment of its rules to provide for a 3 year construction period for all broadcast construction permits and to severely limit permit extensions would have an unnecessarily adverse effect on existing permittees with construction permits that were originally granted close to or more than 3 years prior to the effective date of the rule amendment, such as the permit held by KM Communications, Inc. ("KM") for new full power commercial television station KWKB(TV), Iowa City, Iowa.

Since the KWKB(TV) permit was granted in May 1996, KM has made substantial progress in the construction of the station, diligently overcoming several circumstances beyond its control and expending considerable funds (well over \$500,000) in the process, in reliance on the Commission's existing rules that allow extensions of permits provided one of three specific circumstances can be demonstrated. The application of the new 3 year construction period and limited extension policies to KM's permit for KWKB(TV), however, changes the dynamics of KM's business decisions for KWKB(TV) by potentially limiting KM to only about 4 more months to complete construction, when KM has been quoted delivery intervals of 8 to 10 months for the 1459-foot new guyed tower authorized by the Commission only about 3 months ago.

KM respectfully requests that the Commission, on reconsideration, provide a full 3 year construction period (or at least an 18 month construction period, at a minimum) from the effective date of its order acting on this Petition for Reconsideration for all outstanding construction permits. Alternately, KM proposes that the Commission "grandfather" the prior extension application rules and policies for all outstanding construction permits for a similar 3 year period.

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To: The Commission

**PETITION FOR RECONSIDERATION**

KM Communications, Inc. ("KM"), permittee of new full power commercial television station KWKB(TV), Iowa City, Iowa (the "Station" or "KWKB(TV)"), by its attorneys, and pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, respectfully submits this Petition for Reconsideration of the Commission's decision in the above-captioned proceeding.<sup>1</sup> In the *Mass Media Streamlining Order*, the Commission adopted amendments to its rules which, among other things, would impose a firm 3 year construction period on outstanding broadcast construction permits, with extensions of permits permitted only in extremely limited exceptions, none of which would apply to the KWKB(TV) permit.

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<sup>1</sup> 1998 Biennial Regulatory Review -- *Streamlining of Mass Media Applications, Rules and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, MM Docket Nos. 98-43 and 94-149, Report and Order, FCC 98-281 (released November 25, 1998)(the "*Mass Media Streamlining Order*").

Upon reconsideration, KM requests that the Commission provide relief for permittees with outstanding permits, such as KM's KWKB(TV) permit,<sup>2</sup> that would expire shortly after the February 16, 1999 effective date of the new rules,<sup>3</sup> without the possibility for further extensions, despite the diligent and considerable efforts and costs expended to date to construct such stations. KM respectfully requests that the Commission provide a full 3 year construction period (or at least an 18 month construction period, at a minimum) from the effective date of its order on reconsideration of the *Mass Media Streamlining Order*, for all outstanding construction permits. In the alternative, KM requests that the Commission "grandfather" the prior extension application rules and policies for a similar 3 year period for all outstanding construction permits. For the reasons set forth herein, it is manifestly unfair to permittees such as KM, who can and have demonstrated good faith efforts to construct their stations and have expended considerable time and resources in doing so, to be confronted with and judged under a new set of harsher standards that would impose a severe and unwarranted financial penalty, as well as jeopardize the activation of a new commercial television station in Iowa City, Iowa.<sup>4</sup>

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<sup>2</sup> KM (or its principal) also holds construction permits (or interests in construction permits) for about a dozen other new full power television and FM radio broadcast stations. However, KM is primarily concerned with the adverse effect of the new three year construction period rule on KWKB(TV), due to its unique circumstances, rather than with the effect of the new rule on its other permits.

<sup>3</sup> The rule amendments adopted in the *Mass Media Streamlining Order* will become effective 60 days after publication in the Federal Register, *see Mass Media Streamlining Order* at ¶ 109, or on February 16, 1999. *See* 63 Fed. Reg. 70040 (December 18, 1998).

<sup>4</sup> KM notes that Channel 20 is the only commercial television allotment for Iowa City, *see* 47 C.F.R. § 73.606, and expiration of the permit would preclude the first commercial local television service to this community, at least for some considerable time as may be required to complete the process of petitioning for the allotment of a DTV channel for the community (due to the freeze on applications for permits for vacant analog allotments).

**Preliminary Statement**

KM was granted its construction permit (File No. BPCT-941215KG) to construct a new full power television station on analog Channel 20 at Iowa City, Iowa on May 10, 1996, with an expiration date of May 10, 1998. On June 24, 1996, shortly after the original grant of the permit, KM filed a minor modification application (File No. BMPCT-960624KF) for a new transmitter site, since the original authorized site was no longer available to KM. However, due to delays, first in securing Federal Aviation Administration ("FAA") approvals for alternate sites, and then for Commission evaluation of the potential impact on digital television ("DTV") allotments, the modification application was not granted until October 7, 1998, which extended the permit to its presently scheduled expiration date of April 7, 1999.<sup>5</sup>

Under the amended rules adopted in the *Mass Media Streamlining Order*, the expiration date of KM's permit would be extended only about one month, to May 10, 1999, which is three years after the original grant date, upon the filing of a notification to the Commission. However, this construction period of only about 7 months from the grant of the modification application (*i.e.*, from October 7, 1998 to May 10, 1999) likely would not be sufficient for KM to construct the new 1459-foot guyed tower authorized by its permit, due to the intervals quoted by manufacturers for manufacture, delivery and installation of the tower.<sup>6</sup>

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<sup>5</sup> In the interim, KM applied for and received one extension of the permit (File No. BMPCT-980508KE), granted on July 30, 1998, which extended the expiration date to January 30, 1999.

<sup>6</sup> KM filed an extension application on January 15, 1999, requesting the processing and grant of the application prior to February 16, 1999, under the Commission's existing rules, and seeking a 6 month extension based on these circumstances. KM notes, however, that even an additional 6 months may not be sufficient to complete construction of the new tower, and KM is exploring temporary technical solutions to permit construction in a shorter time frame.

In adopting its 3 year construction period rule, the Commission reasoned that "a three-year construction period would provide all permittees an adequate and realistic time to construct", even if a modification of the permit is required, and that eliminating extension requests would conserve Commission resources.<sup>7</sup> The Commission's logic is fair enough when applied to new permittees that will be subject to the new 3 year construction period, since such permittees will have adequate notice from even prior to the grant of their permit of the strict 3-year, no-extensions policy, and may make business and investment decisions accordingly when developing their permits. Existing permittees such as KM, however, would not be afforded a similar opportunity and advance notice in making their investment decisions, but rather would be faced with the penalty of living with business decisions made under one set of rules (*i.e.*, in which extensions were permitted) but with a dramatically shortened period of time in which to construct.<sup>8</sup> KM's proposed solution of providing a fixed 3 year period from the effective date of any reconsideration of the new rules also would not impose any additional burden on Commission resources.<sup>9</sup>

As explained in more detail below, KM has committed substantial resources to its KWKB(TV) project, both in terms of time and dollars. Various problems required KM to find and secure reasonable assurance for several transmitter sites, including the site ultimately

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<sup>7</sup> See *Mass Media Streamlining Order* at ¶¶ 83 and 79.

<sup>8</sup> Indeed, KM likely would have pursued different alternatives at some point since May 1996 if faced with a fixed 3 year construction period, such as construction of some more limited facility, rather than its current plan of constructing the facility which it believes will best serve Iowa City and surrounding communities, albeit with the substantial new 1459-foot tower.

<sup>9</sup> KM's alternative solution, of grandfathering the prior rules (permitting extensions upon one of three showings), also would impose a minimal burden on staff resources due to the limited number of outstanding permits for which the grandfathered rules would apply.

approved by the FAA and the Commission in the modification application. KM has already expended considerable funds on constructing KWKB(TV), including deposits totalling \$473,000 toward the purchase and installation of the transmitter, transmission line, antenna and related equipment, and a land trust established by and for the benefit of relatives of the principal of KM has already purchased the land (at a cost of \$112,000) and finalized the local zoning for the authorized transmitter site for use by KM. These expenditures were made after the modification application (BMPCT-960624KF) was granted on July 30, 1998, and would predictably be grounds to anticipate a further extension of the expiration date based on established Commission policy.

However, the *Mass Media Streamlining Order* would substitute new standards at this late date for processing extensions of outstanding permits, which would provide no relief to KM, and would effectively cancel the KWKB(TV) permit as of May 10, 1999, stranding the substantial investment to date by KM. At the same time that KM is asked to consider this dilemma, it is also confronted with the need to place another substantial deposit (approximately \$300,000, depending on the vendor selected) on a new guyed tower with a total estimated cost ranging from \$1 million to \$2 million, with the knowledge that the tower companies will be unable to deliver and erect the tower until long after the April 7 or May 10, 1999 expiration dates have passed.<sup>10</sup> KM stands ready to make the necessary expenditure, but is losing valuable time evaluating whether its considerable investment would be stranded and whether some temporary alternate solution is available, rather than focusing on completing constructing of the Station and

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<sup>10</sup> Due in part to the demands on the tower industry due to DTV, at least four tower companies have been unable to guarantee delivery and erection of the new tower prior to the May 10, 1999 expiration date KWKB(TV) would face under the amended rules.

initiating a new television service for the public. Under the policies that were in place when the Station's permit was granted and until the *Mass Media Streamlining Order* was adopted, KM is confident that its diligent efforts and investment in the Station would secure the necessary extension to assure completion of construction. However, under the newly-adopted procedures, KM is assured only that its efforts and investment to date may be lost, and that it can lose an additional \$300,000 or so by making a deposit on the new tower.

### **History of the KWKB(TV) Permit**

The circumstances KM faces with its permit for KWKB(TV), if the Commission's 3 year construction period is applied as originally adopted, may be unusual and unique, based on the specific facts and timing of certain actions on the permit. KM submits this brief summary<sup>11</sup> of its diligent efforts to construct the station, including its timely efforts to overcome the obstacles that have arisen, to demonstrate the inequities that application of the new rules would have in this instance.

KM's permit for KWKB(TV) (File No. BPCT-941215KG) was originally granted on May 10, 1996, as part of a universal settlement among competing applicants. KM experienced problems in constructing the station, primarily in securing a transmitter site that met FAA criteria, would provide city grade coverage to Iowa City, and was available on commercially reasonable terms. The Commission evaluated these factors and found them acceptable in granting of KM's first permit extension request (File No. BMPCT-980508KE).

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<sup>11</sup> A more detailed narrative, as well as supporting documentation, is on file with the Commission in the first extension application (File No. BMPCT-980508KE) and the second extension application filed on January 15, 1999.

Shortly after the original construction permit was granted on May 10, 1996, KM proceeded to finalize arrangements for the space on the existing tower as proposed in its original application; however, KM's option to lease that tower space had expired, due to the length of time the original application was pending, and the tower space was no longer available to KM on the same (or other commercially reasonable) terms and conditions. KM promptly located an alternate site (the "Cedar Bluff Site"), and filed an application for minor modification of the permit (File No. BMPCT-960624KF) on June 24, 1996 (or within approximately 6 weeks of the original permit grant). However, the owner of the Cedar Bluff Site ultimately would not grant KM an easement through adjoining land, owned by the same land owner, that would be necessary for utility service and for access to the site, and therefore KM abandoned the Cedar Bluff Site (the land was also overpriced, more than double the rate for similar land).

KM promptly located another site (the "Amber Site"), filed an amendment to the minor modification application on July 17, 1996 (within one month of filing the minor modification application), and filed the required Notice of Proposed Construction with the FAA. The FAA advised KM that the proposed height would exceed its obstruction standards, but permitted KM to reduce its proposed height dramatically or request further study; since the required city grade coverage could not be obtained at the lower height, KM requested further study (within about one week of receiving the FAA's letter).

On or about February 10, 1997, after completing its further study, the FAA advised KM that the requested tower height would not be approved due to expansion plans at a nearby airport, a factor not previously cited by the FAA in previous discussions. KM promptly located yet another alternate site, and on April 18, 1997 (or within about five weeks after the FAA

indicated that the Amber Site would not be approved), and after some preliminary discussions with the FAA, KM filed an amendment to the minor modification application to specify its fourth site (the "Hale Site"), and filed a new Notice of Proposed Construction with the FAA. On or about August 11, 1997, the FAA advised KM that the proposed height at the Hale Site would not be approved because it would require raising the minimum flying altitude in the area (a factor not raised in KM's preliminary discussions with the FAA when selecting the site), and again suggested that a lower height could be approved, but KM was advised by its consulting engineers that city grade coverage could not be provided to Iowa City at the lower height.

Over the next several months, KM proceeded to investigate a number of alternate sites, and KM's consulting engineers discussed several potential alternate sites with the FAA in advance in an effort to avoid filing for sites for which FAA approval could not be obtained. After tentative FAA approval on a fifth site (the "West Branch Site"), KM filed another amendment to its pending minor modification application, on February 20, 1998. KM received a Determination of No Hazard for the West Branch Site from the FAA in Aeronautical Study No. 97-ACE-1238-OE by a letter dated February 19, 1998, which KM filed with the Commission on February 24, 1998.

In the first extension application (File No. BMPCT-980508KE), KM explained the problems it had encountered in securing a workable site, and documented that it had entered into a binding agreement to purchase the land for the West Branch Site, contingent on Commission grant of the minor modification application, FAA approval (which had already been obtained) and zoning approval (for which KM's local counsel had begun the application process). As

noted above, the first extension application (File No. BMPCT-980508KE) was granted on July 30, 1998, based upon these showings, with an expiration date of January 30, 1999.

Although the extension application had been granted on July 30, 1998, the minor modification application (File No. BMPCT-960624KF) for the alternate West Branch Site remained pending. In mid-June 1998, about four months after FAA approval and in response to an inquiry from KM, the Commission advised that the Commission's engineering software showed a prohibited 1% overlap from the operation proposed in KM's modification application to two co-channel DTV allotments. Although the overlap was not reflected in the calculations of KM's consulting engineers, KM filed a corrective amendment on July 17, 1998, pulling back its proposed contour slightly to resolve the overlap, and the minor modification application was granted almost 3 months later, on October 7, 1998, with the current expiration date of April 7, 1999.

**Activities of KM that Would Warrant a Further  
Extension Under Existing Commission Rules and Policies**

Since the extension and modification applications were granted on July 30 and October 7, 1998, respectively, KM has made diligent and substantial progress toward completing construction of KWKB(TV). Specifically, the land for the West Branch transmitter site has been purchased; final zoning approval for the construction of the tower has been obtained; the necessary equipment (including transmitter, antenna and transmission line) for construction of the station had been ordered (and substantial deposits paid); and quotes for the construction and installation of the new guyed tower have been solicited.

Final zoning approval was obtained, and a special use permit was issued by the Cedar County Board of Adjustment (the local zoning authority), on or about August 27, 1998, or within approximately 1 month after the grant of the first extension application, and even before the grant of the modification application authorizing use of the West Branch Site. The land for the West Branch Site was purchased by a land trust for use by KM (the "Trust").<sup>12</sup> The Trust closed on the purchase of the land for the West Branch Site on or about October 15, 1998, or within approximately 1 week after the grant of the modification application authorizing construction at that site. Copies of the special use permit from the local zoning authority and the warranty deed from the purchase of the West Branch Site are attached as Exhibits 1A and 1B to KM's second extension application (filed on January 15, 1999).

After the grant of the modification application, KM also finalized its negotiations with equipment manufacturers, and on or about December 18, 1998, KM signed purchase orders to purchase the transmitter, transmission line and antenna for the station. Copies of the purchase orders, as well as of the checks for the deposits paid by KM, are attached as Exhibits 1C and Exhibit 1D to the pending second extension application.

KM has been negotiating but has not yet contracted for the purchase of the new guyed tower, the last major element required (along with the purchase of the transmitter site land, local zoning and purchase of the equipment) to proceed with the construction of the station, due to the delivery intervals cited by various tower manufacturers and the uncertainty KM is facing due to the Commission's recent adoption of the Mass Media Streamlining Order. KM had requested

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<sup>12</sup> The land trust was established by and for the benefit of relatives of the principal of KM, for the purpose of purchasing land for use by KM (the "Trust"), due to certain tax, liability and other business considerations.

and/or received quotes from at least five tower manufacturers between May and July 1998, prior to the grant of the extension or modification applications (documentation of the quotes is attached as Exhibit 1E to the pending second extension application); however, the quotes generally specified intervals of from 8 to 10 months for delivery and installation, and KM has not been able to secure assurances that the new guyed tower can be delivered and installed prior to either the current April 7, 1999 expiration date of the construction permit or the 3 year construction period expiration date of May 10, 1999.

Clearly, this degree of good faith progress demonstrated by KM would garner an additional six-month extension of the KWKB(TV) permit under the Commission's existing processing rules<sup>13</sup>. However, by changing the rules governing KM's permit in mid-course, KM's reasonable expectations of success are replaced by the virtual assurance of the loss of the approximately \$500,000 or more that it has already spent, plus the likelihood that it could lose at least an additional \$300,000 or so if it proceeds to order the necessary tower. The unfairness of imposing new standards on KM is obvious, and therefore the relief proposed herein is respectfully requested.

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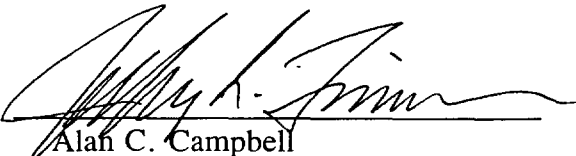
<sup>13</sup>

*See* 47 C.F.R. §73.3534.

**Conclusion**

For the reasons set forth above, KM requests that the Commission reconsider the portion of its *Mass Media Streamlining Order* that would impose a firm 3 year construction period and severely limit further extensions of outstanding construction permits. On reconsideration the Commission should either (i) provide a full 3 year construction period (or at least an 18 month construction period, at a minimum) from the effective date of its order on reconsideration of the *Mass Media Streamlining Order*, for all outstanding construction permits; or (ii) "grandfather" the prior extension application rules and policies for a similar 3 year period for all outstanding construction permits.

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